United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7005

United States Court of Appeals

B

FOR THE SECOND CIRCUIT

No. 76-7005

EAST HARTFORD EDUCATION ASSOCIATON, ET AL
Appellants

v.

BOARD OF EDUCATION OF THE
TOWN OF EAST HARTFORD, ET AL
Appellees

On Appeal From the United States District Court for the District of Connecticut

BRIEF FOR THE APPELLANTS

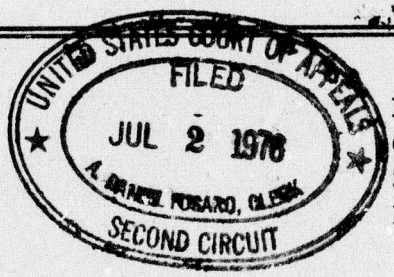

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TABLE OF CONTENTS

TABLE OF CASES AND
MISCELLANEOUS AUTHORITY

Case: Page

Table of Cases cont'd.

Case: Page

Table of Cases cont'd

Case: Page

MISCELLANEOUS AUTHORITY:

STATEMENT OF ISSUE PRESENTED

Whether the Court erred in holding, upon the defendants' motion for Summary Judgment, that a local Board of Education has the constitutional right to establish by rule an enforceable dress code guideline for teachers in the local school system, requiring, among other things, that male teachers wear a tie and jacket; and that the individual teacher's interest in appearing as he pleases, within certain limitations, is not a protected interest under the United States Constitution.

STATEMENT OF THE CASE

The East Hartford Board of Education has adopted a dress code which requires, among other things, that the plaintiff, Richard Brimley, wear a jacket, shirt and tie while teaching his classes.

The plaintiffs brought this action challenging said dress code on the grounds that it violates the constitutional rights of the plaintiff Brimley.

The District Court, T. Emmet Clarie, Chief

Judge, granted Summary Judgment in favor of the defendants on the ground that the complaint fails to state a claim upon which relief can be granted.

ARGUMENT

I.

THE DISTRICT COURT ERRED IN HOLDING, UPON THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, THAT A LOCAL BOARD OF EDUCATION HAS THE CONSTITUTIONAL RIGHT TO ESTABLISH BY RULE AN ENFORCEABLE DRESS CODE GUIDELINE FOR TEACHERS IN THE LOCAL SCHOOL SYSTEM, REQUIRING, AMONG OTHER THINGS, THAT MALE TEACHERS WEAR A TIE AND JACKET; AND THAT THE INDIVIDUAL TEACHER'S INTEREST IN APPEARING AS HE PLEASES, WITHIN CERTAIN LIMITATIONS, IS NOT A PROTECTED INTEREST UNDER THE UNITED STATES CONSTITUTION.

At the outset of this argument it must be noted that there has been no showing, nor any allegation, that Mr. Brimley's style of dress causes any disruption whatever in the school system.

If a school board were able to show that the dress of a teacher within the school system was causing disruption, impairing the educational climate in any way, or materially and substantially interfering with discipline or operations in the system, then, perhaps, the establishment

and enforcement of a dress code designed to end such turmoil might be authorized.

In the instant case, however, the Board of Education asserts the absolute right to regulate teacher dress, without any necessity for the showing of any interest whatsoever on its part. It is submitted that the State does not have the absolute right to regulate the dress of its employees.

The plaintiff Brimley alleges, and for the purposes of the Motion for Summary Judgment it must be admitted, that he wishes to conduct his classes attired in a sportshirt without a tie, and a sport jacket or sweater for several reasons:

(a) He wishes to present himself to his students as a person who is not tied to "establishment conformity;"

(b) He wishes to symbolically indicate to his students his association with the ideas of the generation to which those students belong, including the rejection of many of the customs and values, and of the social outlook, of the older generation;

(c) He feels that dress of this type enables him to achieve a closer rapport with his students, and thus enhances his ability to teach.

Mr. Brimley is willing to comply with any reasonable requirement with regard to neatness and cleanliness; and in fact, his attire is and always has been neat and clean, the only complaint being the lack of a tie.

The basic question at issue here is whether there is a constitutional right for a person to dress and conduct himself as his own conscience commands so long as the matter of dress and conduct do not interfere with any legitimate state interest. Perhaps Bates v. Little Rock, 361 U.S. 516 (1960) provides the answer:

> "Where there is a significant encroachment upon personal liberty, the state may prevail only upon showing a subordinating interest which is compelling."

To what extent does "liberty" grant to a citizen the right to be free from over solicitous regulation and supervision? Griswold v. Connecticut, 381 U.S. 479 (1965) recognized the existence of specific guarantees unenumerated in the Bill of Rights, those lying within "penumbras, formed by emanation from those guarantees that helped give them life and substance." We submit that the state has no more

interest in an inoffensive manner of attire than it does in the bridal chamber. Constitutional authority approving state action in decreeing the manner of dress would authorize a uniformed citizenry.

The right of all persons to symbolic expressions such as the wearing of arm bands is now established, at least where "there is no finding and no showing that the exercise of the forbidden right would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'" Tinker v. DesMoines School District, 393 U.S. 502 (1969). Nor may the school forbid the wearing of "freedom buttons". Burnside v. Byars, 363 F. 2d 744 (5th Cir. 1966). This Court, in James v. Board of Education, 461 F. 2d 566 (1972), cert. den. 409 U.S. 1042, (1972), reh. den. 410 U.S. 947 (1973), has followed Tinker with regard to First Amendment rights of teachers.

It is as firmly established that teachers may not be discharged for failure to reveal

organizational memberships, Shelton v. Tucker, 364 U.S. 479 (1960), nor for exercising their right to speak upon public issues. Pickering v. Board of Education, 391 U.S. 563 (1968). The right to teach itself is constitutionally endowed. Meyer v. Nebraska, 262 U.S. 390 (1923).

The Supreme Court has long held that "government . . . may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . .". Perry v. Sinderman, 408 U.S. 597 (1972). As stated in Developments, Academic Freedom, 81 Harv. L.R. 1045, 1079, "although no one has the right to a particular government job, the state has no license to embark upon a discriminatory hiring policy or any other arbitrary or capricious course of action." Academic Freedom is the hallmark of a democracy and special protection should be extended to the teachers who promote that end. Sweezy v. New Hampshire, 354 U.S. 234 (1957).

The majority of adjudicated cases specifically dealing with dress codes concern male

teachers' and students' boards and hair length. In Breen v. Kahl, 419 F. 2d 1034 (7th Cir. 1969), cert. den., 398 U.S. 937 (1970), the court ruled that a regulation of a high school that male students must keep their hair washed, combed and worn so that it does not hang below the collar line in back, nor over the ears, nor below the eyebrows, and without long sideburns, was unconstitutional. The rationale of the decision was that "the right to wear one's hair at any length or in any desired manner is an ingredient of personal freedom protected by the United States Constitution." Id. at 1036. Accord, Crews v. Cloncs, 432 F. 2d 1259, 1263 (7th Cir. 1970) (citing Griswold v. Connecticut, supra); Richards v. Thurston, 424 F. 2d 1281 (1st Cir. 1970); Stull v. School Board of Western Beaver Junior-Senior High School 459 F. 2d 339 (3rd Cir. 1972); Mick v. Sullivan, 476 F. 2d 973 (4th Cir. 1973); Bishop v. Colaw, 450 F. 2d 1069 (8th Cir. 1971). See also Yoo v. Moynihan, 28 Conn. Sup. 375, 262, A 2d 814 (1969) involving the same board of education as in the case at

bar, wherein the state court held the student dress code unconstitutional.

It is submitted that the freedom to dress as one chooses is no less protected than the freedom to wear one's hair as one chooses.1/

The First Congress, which passed the Bill of Rights, thought it frivolous to suggest, for example, that the state might presume to tell a man whether or not to wear a hat. Annals of Congress 732 (August 1789); discussed in Brandt, The Bill of Rights, 53-61 (1965). And the Crews Court cited as examples of "state repression and tyranny" the "many examples of regimes which have attacked and silenced their opponents by requiring conformity of hairstyle or dress."

1/ The argument that hair is more permanent and thus these cases are not persuasive in dress code is misplaced. As suggested by this Court in Gianatasio v. Whyte, 426 F. 2d 908 (2d Cir. 1970), cert. den. 400 U.S. 941, a military case, a short hair wig might be utilized in an appropriate instance; yet the courts have not chosen to require these measures. Moreover, and more importantly in the framework of the plaintiffs' First Amendment claims, the courts in Tucker and James, et al, could well have held that armbands and buttons must be taken off in school; yet, again, this is not the law. It makes little sense, therefore, to attempt to distinguish the hair cases from the dress cases on these grounds.

Crews v. Cloncs, supra, 432 F. 2d at 1264. In short, freedom of personal appearance is "within the commodious concept of liberty, embracing freedoms great and small." Richards v. Thurston, 424 F. 2d 1281, 1285 (1st Cir. 1970).

As stated by the Court in Richards,

> "Yet 'liberty' seems to us an incomplete protection if it encompasses only the right to do momentous acts, leaving the state free to interfere with those personal aspects of our lives which have no direct bearing on the ability of others to enjoy their liberty. As the Court stated in Union Pacific Railway Co. v. Botsford, 141 U.S. 250, 251 (1891):
>
> > "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, 'The right of one's person may be said to be a right of complete immunity: to be let alone.'"
>
> Indeed, a narrower view of liberty in a free society might, among other things, allow a state to require a conventional coiffure of all its citizens, a governmental power not unknown in European history.
>
> We think the Founding Fathers understood themselves to have limited the government's power to intrude into this sphere of personal liberty, by reserving some powers to the people." Id at p. 1284, 1285.

The instant case, to be sure, involves the freedom of a teacher, whereas the plaintiffs in the above-cited cases were children. The Breen court, however, treated the freedom of adults to wear their hair in the manner they pleased as so clearly beyond the state's power to regulate that the issue needed no argument. The Court said:

> "Although there may be different justifications for a statute which is applicable to adults and one which applied to students of a high school, the Constitution protects minor high school students as well as adults from arbitrary and unjustified governmental rules." 419 F. 2d at 1036.

Indeed the courts have long held that if constitutional protections differ between child and adult, it is the child who has less protection. E. g., Prince v. Massachusetts, 321 U.S. 158 (1944) ("the power of the state to control the conduct of children reaches beyond the scope of its authority over adults"); Ginsberg v. New York, 390 U.S. 629 (1968), reh. den. 391 U.S. 971 (1968) (same); Cf. In re Gault, 387 U.S. 1 (1967).

This Court has also dealt with the ques-

tion of differing constitutional protections as between students and their teachers, and has resolved the problem as follows:

> "There is little room in what Mr. Justice Jackson once called the 'majestic generalities of the Bill of Rights,' Board of Education v. Barnette, supra, at 639, for an interpretation of the First Amendment that would be more restrictive with respect to teachers than it is with respect to their students, where there has been no interference with the requirements of appropriate discipline in the operation of the school, Tinker v. Des Moines School Dist., supra, at 509." Russo v. Central School District No. 1, 469 F. 2d 623, 631 (2nd Cir. 1972), cert. den, 411 U.S. 932 (1973).

The few courts that have faced the issue have held that an adult's freedom to fashion his hair style is greater than a child's. In Lansdale v. Tyler Junior College, 470 F. 2d 659, 663 (5th Cir. 1972) cert. den. 411 U.S. 986 (1973), the Fifth Circuit upheld an "adult's constitutional right to wear his hair as he chooses" despite its earlier holding in Karr v. Schmidt, 460 F. 2d 609, 611 (5th Cir. 1972), Motion To Vacate Stay Den., 401 U.S. 1201, (1971), that a student's "right to be free of school regulations governing the length of his

hair" is a claim "not cognizable in the federal courts." Nor are an adult's rights any less because his occupation is that of a teacher. Pickering v. Board of Education, 391 U.S. 563, 568 (1968) (premise that "teacher may constitutionally be compelled to relinquish . . . rights they would otherwise enjoy as citizens . . . unequivocally rejected . . ."). Thus, in Conard v. Goolsby, 350 F. Supp. 713 (N.D. Miss. 1972), the district court held that teachers had the right to wear beards, moustaches, or sideburns as they pleased even though their students did not, declaring:

> ". . . (I)n the absence of a showing of 'unusual conditions' a high school grooming regulation which limits the length and style of an adult teacher's hair, including his moustache, goatee or beard is irrelevant to any legitimate state interest . . .. Under settled constitutional principles, we find that such regulations, which are of general import, create an arbitrary and capricious classification, devoid of logic and rationality, and plainly offend both substantive due process and equal protection guaranteed by the Fourteenth Amendment. Plaintiffs did not lose these rights by signifying their willingness to abide by the Board's rule and regulations as a condition of re-employment, as the waiver of constitutional rights may not be a condition of public employment."

To the same effect is Finot v. Pasadena Board of Education, 20 Cal. App. 2d 168, 58 Cal. Reporter 520 (1967), where a teacher was transferred from classroom teaching to home teaching for violating a school policy against the wearing of beards. The court ordered reinstatement of the teacher to the classroom holding that the wearing of a beard was a matter of right as one of the personal liberties protected under the due process provisions of the Federal Constitution. Accord, Braxton v. Board of Public Instruction of Duvol County, Florida, 303 F. Supp 958 (M.D. Fla. 1969); Ramsey v. Hopkins, 320 F. Supp. 477 (N.D. Ala. 1970); Peck v. Stone, 304 N.Y.S. 881 (N.Y. Sup. Ct., App. Div. 4th Dept. 1969), (attempt to bar mini skirt worn by female attorney held improper).

The defendant, in its brief to the District Court, relied heavily on Miller v. School District No. 167, Cook County, Ill., 495 F. 2d 658 (7th Cir. 1974). The court in Miller, however, specifically stated as follows:

> "He is not claiming that his mode of dress and his Vandyke beard were intended

to convey a specific message . . . ."
Id. at 662.

Thus, the holding in Miller is clearly distinguishable on the ground that Mr. Brimley specifically does allege that his mode of dress is intended to convey a specific message.

The defendant also sought to rely on Ham v. South Carolina, 409 U.S. 524 (1973), wherein the Supreme Court held that it was error for the district court to refuse to voir dire prospective jurors in a criminal case concerning racial prejudice, but it was not error to refuse to voir dire those jurors specifically concerning a bias against beards. It is clear that Ham did not address the issue at bar - whether personal grooming is a constitutionally protected freedom. In Ham, the Supreme Court did not proceed by identifying the constitutional rights of the defendant and then ordering that prospective jurors be voir dired as to possible bias with respect to those rights. Rather, the central concern of the Supreme Court in Ham was to assure that "the essential demands of fairness" had been met in Ham's trial (409 U.S. at

526).

The Court said "the essential fairness required by the Due Process Clause of the Fourteenth Amendment required that under the facts shown by this record the petitioner (must) be permitted to have jurors interrogated on the basis of racial bias" (409 U.S. at 527). The facts, insofar as they appear in the opinion, showed that Ham was black, that he was being tried in South Carolina and that his defense was that local authorities "were 'out to get him' because of his civil rights activities" with the Southern Christian Leadership Conference and the Bi-Racial Committee of the City of Florence. Under these circumstances the Court held that voir dire on racial bias were required.

There were no comparable facts on which to predicate the existence of a probable prejudice against the wearer of a beard and thus the Court held that a special voir dire on this subject was not required. The Court stated that it was unable "to constitutionally distinguish possible prejudice against beards from a host of other

possible similar prejudices," and that the "trial judge's refusal to inquire as to particular bias against beards, after his inquiries as to bias in general, does not reach the level of a constitutional violation" (409 U.S. at 528).

In short, the Supreme Court did not hold that one has no constitutionally protected freedom or right to wear a beard. Nor did the Court hold that all constitutionally protected rights must be the subject of special questions on voir dire. Rather, to the extent that one can generalize from Ham, the generalization is that due process requires courts to voir dire prospective jurors with specificity on those forms of bias which the facts indicate the veniremen are likely to harbor. It simply defies principles of orderly judicial decision making to conclude that in Ham the Supreme Court, aware of the number of hair cases in the federal courts and aware of the existence of more than 50 reported decisions on the subject, held, sub silentio, in a criminal case that the Constitution does not protect one's freedom to groom himself as he

chooses. See dissenting opinion of Douglas, J., 409 U.S. at 529-530.

In this respect Connors v. United States, 158 U.S. 408 (1895) is illustrative. Connors dealt with a trial court's conduct of a voir dire examination prior to a criminal trial. There the defendant was accused of stealing votes, thereby affecting the results in congressional elections. The defendant sought to inquire whether the political affiliation and predelictions of the veniremen would bias their judgment in the case. The district judge refused to propound such questions, the jury convicted the defendant, and the Supreme Court affirmed. Clearly, Connors does not cast doubt on the constitutional right of every citizen to belong to the political party of his choice any more than Ham casts doubt on the right of a citizen to choose his mode of hair and dress. Neither Ham nor Connors dealt with the substantive constitutional rights of the ordinary citizen. Those rights have been elsewhere determined.

This Court did, of course, deal with the problem in Dwen v. Barry, 483 F. 2d 1126 (2nd Cir. 1973), reversed, sub nom. Kelley v. Johnson, ____ U.S. ____, 47 L. Ed 2d 708 (April 5, 1976), involving a grooming code of the Suffolk County, New York, Police Department. This court held that there was "a substantial constitutional issue raised by regulation of the plaintiff's hair length," Id. at 1130, and the language of that decision clearly supports the claims of the plaintiffs herein. This court further stated as follows:

> "The Court correctly recognized that the regulation might well raise constitutional issues of the right to free expression, due process and equal protection if applied to other than uniformed personnel . . . ." Id. at 1128. (emphasis added).

Thus, the very issues which these plaintiffs have raised concerning teachers, were anticipated by this Court in Dwen, and were commented upon in language which parallels the plaintiffs' arguments herein as to "free expression, due process and equal protection." This represents precisely the First Amendment claims of the plaintiffs which were not even at issue in

Miller, supra. It is submitted that this Court, at least prior to the decision in Kelley v. Johnson, would not only have held for the plaintiff in Miller, but would also have held for the plaintiffs herein based upon the language in Dwen.

It remains, therefore, only to analyze Kelley in an effort to determine whether that case in fact purports to alter the application of the principles enunciated in Dwen as applied to public school teachers.

II.

KELLEY V. JOHNSON IS DISTINGUISHABLE FROM THE INSTANT CASE.

Any analysis undertaken to distinguish Kelley from cases involving teachers must necessarily begin with a study of the long line of cases which have dealt with the constitutional rights of teachers in the classroom setting.

The Supreme Court has repeatedly emphasized that the First Amendment "is nowhere more vital than in the community of American schools," Shelton v. Tucker, 364 U.S. 479, 487 (1960);

Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967). "The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues,' [rather] than through any kind of authoritative selection." Keyishian, 385 U.S. at 603.

If teachers had no right to expose students to unpopular viewpoints, the State would be able to "foster a homogenous people", Meyer v. Nebraska, 262 U.S. 390, 402 (1923); Tinker, supra, 393 U.S. at 511; to "cast a pall of orthodoxy over the classroom", Keyishian, supra, 385 U.S. at 603; to operate its schools as "enclaves of totalitarianism," Tinker, supra, 393 U.S. at 511. Academic freedom is "a special concern of the First Amendment", Keyishian, supra, 395 U.S. at 603, precisely because it guards against these evils:

> "In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved . . . As

> Judge Gewin, speaking for the Fifth Circuit, said, school officials cannot suppress 'expressions of feelings with which they do not wish to contend.' Burnside v. Byars, [363 F. 2d 744] at 749." Tinker, supra, 393 U.S. at 511.

See also, Epperson v. Arkansas, 393 U.S. 97, 115-16 (1968) (concurring opinion of Mr. Justice Stewart).

Based upon these Supreme Court pronouncements, the lower courts in recent years have set aside many dismissals of teachers for in-class conduct held to be protected by the First Amendment. Keefe v. Geanakos, 418 F. 2d 359 (1st Cir. 1969) (assigning a magazine article using the word "m----- f-----", and discussing the etymology of the word); James v. Board of Education, 461 F. 2d 566 (2d Cir.), cert. denied 409 U.S. 1042 (1972) (wearing a black armband in symbolic protest against the Vietnamese War); Parducci v. Rutland, 316 F. Supp. 352 (M.D. Ala. 1970) (assigning a Kurt Vonnegut short story in which an organization advocated free sex and killing of the elderly); Mailloux v. Kiley, 323 F. Supp. 1387 (D. Mass. 1971) affirmed 448 F. 2d 1242 (1st Cir. 1971) (writing "f---" on the black-

board during a discussion of social taboos); Downs v. Conway School District, 328 F. Supp. 338 (E.D. Ark. 1971) (criticizing the school's failure to fix a broken water faucet and its serving of cooked rather than raw carrots in the cafeteria); Webb v. Lake Mills Community School District, 344 F. Supp. 791 (N.D. Iowa, 1972) (drama teacher producing a play depicting drinking and using words "darn" and "son of a gun"); Lindros v. Governing Board of Torrance, 9 Cal. 3d 524, 510 P. 2d 361 (1973) (teacher reading his own story to class, in which he uses obscene language); Oakland Unified School District v. Olicker, 25 Cal. App. 3d 1098 (1972) (distributing student essays containing references to male and female sex organs and the sex act). See also, Russo v. Cen School District No. 1, 469 F. 2d 623 (2d Cir. 1972); Hanover v. Northrup, 325 F. Supp. 170 (D. Conn. 1970); Frain v. Baron, 307 F. Supp. 27, 32 (E.D. N.Y. 1969).

The "academic freedom" espoused in these decisions is clearly applicable to the concerns of the plaintiff Brimley in the instant case.

As stated in Part I hereof, Mr. Brimley's desire not to wear a tie stems in part from his belief that that will better enable him to relate to his students, to achieve a closer rapport with them, and thus to enhance his ability to teach them.

The Board of Education, in its desire to have each of its male teachers look the same, fit the same mold of conservatism and adopt the uniform of the jacket and tie, is attempting to "foster a homogenous people," "cast a pall of orthodoxy over the classroom" and operate its schools as "enclaves of totalitarianism" no less than did the school boards in Tinker and Keyishian, supra. It is submitted that there is no cognizable difference between the type of in-class conduct which was the subject of the cases cited above, and the conduct of Mr. Brimley who merely wishes to convey his message by his mode of dress.

The question to be faced at this juncture, then, is whether the Supreme Court's opinion in Kelley applies to teachers, in view of its

previous holdings with regard to academic freedom.

It is important to note that Kelley involved claims of policemen, and the Supreme Court analyzed the case in that framework. Thus, the Court assumes that the general citizenry has a liberty interest in matters of personal appearance (47 L. Ed 2d at 714), but points out that the hair length regulation "touches respondent as an employee of the county and, more particularly, as a policeman." Ibid; emphasis added). The Court points out that policemen may be compelled to "wear a standard uniform, specific in each detail" and when in uniform "must salute the flag." Ibid. Here, too, the distinction is clear. Under this Court's decision in Russo, supra, teachers need not salute the flag in their classrooms; and neither, it is submitted, can they be compelled to wear a standard uniform.

In arriving at its decision, the Court in Kelley stresses the analogy to Cafeteria Workers v. McElroy, 307 U.S. 886, 896 (1961), and con-

cludes that the police department should be accorded the same wide latitude which is accorded to the military in the "dispatch of its own internal affairs." The Court further places reliance upon "the overall need for discipline, espirit de corps, and uniformity" (47 L Ed 2d at p.715); and the desire for "similarity of police officers" (47 L Ed 2d at p 716)2/. Surely these ideals which the Supreme Court finds convincing in dealing with a para-military organization are the very antithesis of the ideals embodied in its decisions regarding academic freedom.

Moreover, it is extremely significant that the Supreme Court made no mention whatsoever of First Amendment rights. Indeed, as Mr. Justice Marshall, with whom Mr. Justice Brennan joined, points out in his dissent, "the parties did not address any First Amendment issues in any detail in this Court." (47 L Ed 2d at p. 718 n. 2).

2/ The emphasis which the Supreme Court places on "discipline, espirit de corps, and uniformity" is demonstrated by its reference to this aspect of its decision in its opinion in Quinn v. Muscare, U.S. (May 3, 1976), dealing with personal appearance of firemen.

Mr. Justice Marshall further points out that "governmental regulation of a citizen's personal appearance may in some circumstances not only deprive him of liberty under the Fourteenth Amendment but violate his First Amendment rights as well." Ibid. And Mr. Justice Powell in his concurring opinion states that there is justification for "the application of a reasonable regulation to a uniformed police force that would be an impermissible intrusion upon liberty in a different context."(47 L Ed 2d at p. 717.)

It is submitted that the public schools are just such a "different context," and that nothing in the majority opinion lends any indication that that decision would be the same in the case of a public school teacher claiming both the Fourteenth Amendment rights to liberty and First Amendment rights to freedom of expression.

In view of the academic setting and the First Amendment claims, it is submitted that the proper test to utilize in determing whether the Board's prohibition is valid is whether the

failure to wear a tie would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," Tinker v. DesMoines School District, supra; or, whether the regulations "needlessly, arbitrarily or capriciously impinges upon" a protected interest. Cleveland Board of Education v. LaFleur, 414 U.S. 632, 640 (1974) (emphasis added). In arriving at its test of "whether the respondent can demonstrate that there is no rational connection between the regulation, based as it is on respondent's method of organizing its police force, and the promotion of safety of persons and property," the Supreme Court obviously made specific reference to the police context. Indeed, the test is based upon the Courts statement that "Choice of organization, dress, and equipment of law enforcement personnel is a decision entitled to the same sort of presumption of legislative validity as are state choices designed to promote other aims within the cognizance of the State's police power." (47 L Ed 2d at p. 715; emphasis

added). Again, there is no question of "police power" in the schools, nor are the schools analogous to the military as in Cafeteria Workers, also cited with regard to this test.

But even if this Court should be of the opinion that the test in Kelley is the proper one in this instance, it is submitted that there is no rational basis to require a teacher to wear a tie, and that such a requirement is arbitrary and unreasonable. The District Court held that since teachers set an example in dress for their students to follow, the tie requirement is not arbitrary. But, again, the State is not the proper entity to set rules for dress of the general citizenry. If the State can require teachers to wear a tie and jacket to set an example for their students to follow, why not any kind of uniform the State believes is fitting? Thus begins the "uniformed citizenry" - the antithesis to the Bill of Rights and the holdings of the Supreme Court. See Dissenting Opinion of Justice Marshall in Kelley (47 L Ed 2d at page 717, n. 4). The opinion of the

District Court goes on to state that a tie presents "an image of dignity and encourages respect for authority" thus aiding in classroom discipline. But there is no challenge to Mr. Brimley's ability to achieve classroom discipline without a tie; and it is not a function of the State to set as a standard for dignity the wearing of a tie and jacket. An analysis of the District Court opinion, and of the record herein, thus reveals a lack of any sufficient reasons upon which this Court can rely in holding that this dress code is reasonable. At least in the absence of a trial on the merits, it is submitted that the record before this Court shows an arbitrary and needless restriction imposed upon this teacher, one which hinders him in his attempt to impart knowledge to his students, and one which is totally outweighed by his constitutionally protected interests under the First and Fourteenth Amendments.

CONCLUSION

The defendants ask this court to assume, without evidence, that there is a legitimate

governmental interest involved with whether or not Mr. Brimley wears a tie. It is submitted that not only is there no compelling interest on the part of the defendant, there is no legitimate state interest at all; and certainly this court should not infer such an interest in the absence of testimony.

The controlling authority under which this matter should be decided is Dwen v. Barry, supra, which has not been weakened as to this teacher plaintiff by its reversal inasmuch as that reversal was based on factors unique to the police force. The analysis and conclusions of that case, and the other cases cited hereinabove, apply equally to the instant case and demonstrate the existence of a constitutionally protected right.

Judge Wyzanski has summarized the rights claimed herein as follows:

> "The right claimed by the Grievant might be described as one of the aspects of personal liberty, that is, liberty of appearance; or alternately, as one of the aspects of freedom of expression, that is the right symbolically to indicate his association with some of the younger generation in expressing

their determination to reject may of the customs and values of some of the older generation." See, Third Supplementary Opinion of Wyzanski, J., Richards v. Thurston, 304 F. Supp 449, 455-7 (1969).

It is not the place of the State to stifle that independence by setting up, as models of dress and behavior, teachers identically costumed in the uniform of the jacket and tie, in the hope that by so doing it will achieve the goal of uniforming those students.

For all of the above stated reasons, the appellants request this court to reverse the decision of the District Court and remand this case for a trial on the merits.

Respectfully submitted,
Appellants

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PROOF OF SERVICE

This is to certify that I have served the foregoing brief by putting two copies in properly addressed envelopes and mailing the same, postage prepaid, on this 30th day of June, 1976, to Brian Clemow, Esquire, and Coleman H. Casey, Esquire, of Shipman & Goodwin, 799 Main Street, Hartford, CT 06103.

By Martin A. Gould